Supreme Court, U.S.
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In The
Supreme Court of the United States

MARCH MEEK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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31 pages

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment forbids a state court from upholding a conviction obtained under a statute which fails to provide fair warning that a person could be punished by imprisonment for ten times the amount of time an ordinary person would think he could be imprisoned for if convicted of violating the statute?

PARTIES TO THE PROCEEDINGS

The petitioner in this action is March Meek. The respondent in this action is the State of Mississippi.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, March Meek, requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi in *March Meek v. State of Mississippi,* 806 So.2d 236 (Miss. 2001).

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Mississippi was reported as *Meek v. State*, 806 So.2d 236 (Miss. 2001)

JURISDICTION

This Court has jurisdiction to review the decision of the Supreme Court of the State of Mississippi entered on October 18, 2001, rehearing denied January 24, 2002, by writ of certiorari under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10, of the United States Constitution provides, in part, that:

> No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

Following a trial by jury conducted in the Lincoln County Circuit Court on November 3-4, 1997, Meek was convicted of the unlawful transfer of 140.9 grams of marijuana.[1] He was thereafter sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections with ten years to actually serve in prison and the remaining twenty years to be served on post release supervision. Meek was also ordered to pay a fine in the amount of $2,000.00.

After all proper post-trial motions were filed and overruled by the trial court, Meek appealed the conviction and sentence to the Mississippi Court of Appeals. In a 5-5 decision, the Court of Appeals affirmed Meek's conviction and sentence on February 8, 2000 as set forth in Appendix 22. Meek's petition for rehearing was denied on May 2, 2000 as set forth in Appendix 21.

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[1] A pack of cigarettes weighs approximately 20 grams.

On May 16, 2000, Meek petitioned the Supreme Court of the State of Mississippi for a writ of certiorari. Such relief was granted on August 20, 2000.

On April 5, 2001, the Supreme Court reversed the judgment and remanded to the Circuit Court for entry of a judgment convicting Meek of the crime of possession of marijuana and sentencing him for that conviction. Three judges dissented as set forth in Appendix 9.

On October 18, 2001, the State's motion for rehearing was granted, the original opinions were withdrawn and Meek's conviction and sentence were affirmed. One judge dissented and two did not participate as set forth in Appendix 1.

Rehearing was denied on January 24, 2002 as set forth in Appendix 1.

STATEMENT OF THE FACTS

During the night of March 2, 1996, Meek, a 28 year old resident of Lincoln County, Mississippi, was riding as a passenger in an automobile driven by Delinah Chauvin. Shortly before 9:00 p.m. they collided head-on with a vehicle being driven on the wrong side of the road. Meek and Chauvin were severely injured and pinned inside the car. (R. 53-54)

Immediately after the accident, Meek asked Chauvin if she could get out of the car because ". . . there was something in the car that needed to be removed." (R. 115) The "something" was Meek's shaving kit which contained 140.9 grams of marijuana. (R. 148)

Phillip Hemby was an eyewitness to the accident. When he approached the passenger side of Meek's vehicle, Meek handed him the shaving kit and asked him to ". . . get rid of this for him." (R. 100) Hemby handed the shaving kit back to Meek and went to check on the other driver. (R. 101-02) A short time later Hemby observed the shaving kit on the shoulder of the road. (R. 101) Hemby, a Baptist preacher, kicked it into a ditch in order to preserve it for law enforcement authorities. (R. 102-04)

Hemby pointed out the shaving kit to Trooper Brian Phillips when he arrived on the scene. Trooper Phillips checked out the shaving kit and found that it contained marijuana.

On March 11, 1997, Meek was indicted by the Lincoln County Grand jury. The indictment charged that March Meek

> on or about the 2nd day of March, 1996, in Lincoln County, Mississippi, and within the jurisdiction of this court, did wilfully, unlawfully, feloniously and knowingly transfer more than one ounce of marijuana, a controlled substance, but less than one kilogram of marijuana, to one Phillip Hemby, a human being, contrary to and in violation of Section 41-29-139 of the Mississippi Code of 1972, and against the peace and dignity of the State of Mississippi.

Meek was indicted under § 41-29-139(a)(1) Miss. Code Ann. which provides that:

> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:

> (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance;

The trial was held on November 3-4, 1997 before the Honorable Keith Starrett and upon testimony to the foregoing facts, the jury convicted Meek of transferring the marijuana to Phillip Hemby.

On November 12, 1997, Meek was sentenced to 30 years, with 10 to serve in prison and 20 years to be served under post-release supervision. Because Meek had previously been sentenced to three years in 1987 for burglary and to three years in 1991 for sale of marijuana, Meek was sentenced as a habitual offender under § 99-19-8, which meant the ten years would have to be served day for day. Meek was also ordered to pay of fine of $2,000.00 and all court costs.

On November 19, 1997, Meek filed his Motion for New Trial which included the following grounds:

> (3) That the State failed to prove the statutory elements of transfer as required by law.
>
> (4) That the indictment found in this case is improper and the evidence does not justify the charge of transfer as indicated by the State.

(DE: 72-74) The Motion for New Trial was denied on November 25, 1997.

Meek appealed to the Mississippi Court of Appeals. The first issue presented to that court was that:

> THE STATE HAS FAILED TO PROVE THE ESSENTIAL ELEMENT OF THE OFFENSE TOWIT: TRANSFER WITH INTENT TO "SELL,

> BARTER, TRANSFER, MANUFACTURE, DISTRIBUTE OR DISPOSE" AS SET FORTH IN § 41-29-139, MISSISSIPPI CODE OF 1972 AS AMENDED. Brief of Appellant, p. 1, 8.

Meek argued that the "State must prove intent beyond reasonable doubt for evidence to be sufficient to establish possession of a controlled substance with intent to distribute or sell. Mere suspicion of intent cannot support a conviction." Brief of Appellant, p. 9.

The Court of Appeals affirmed Meek's conviction and sentence on February 8, 2000 as set forth in Appendix 22.

In finding that the trial court was correct in refusing to grant a directed verdict on the basis that the state failed to prove the essential elements of the offense, the Mississippi Court of Appeals noted:

> Meek would have us conclude that the phrase "intent to sell" applies to all the actions criminalized by the statute. The less forced reading of the statute is that a conviction may be sustained if there is evidence that a person sold, manufactured or transferred. There may also be a conviction based on evidence that a person still possessing the contraband had the intention to sell, manufacture, or transfer. The accused must have some mental state of knowledge and intent depending on the nature of the act, but there is nothing in the statute that would suggest that every act done must be with intent to sell. In fact, as already discussed one of the reasons for the words "delivery" and "transfer" is to avoid the need for proof that there was a profit motive.

[Appendix 35-36] Judge Southwick, with Judges McMillin, Bridges, Irving and Payne concurring.

Noting that the majority's decision to affirm Meek's conviction "defies logic," Judge Diaz, joined by Judges King, Lee, Moore and Thomas, cited *Taylor v. State*, 656 So.2d 104 (Miss. 1995) as authority which supported Meek's argument that the state failed to prove intent. [Appendix 40]

In *Taylor*, the Mississippi Supreme Court held that:

> [C]riminal intent may, and ordinarily can only be shown by surrounding circumstances. . . . [A] jury may reasonably conclude that a defendant intended to unlawfully distribute a controlled substance, if the quantity or nature of the seized substance evidences an intent to distribute – as opposed to an intent to merely possess for personal use. . . . Where the quantity or nature is such that it merely reflects possession for personal use as an intent to distribute, then only a suspicion of intent is raised. (Citations omitted)

Taylor v. State, 656 So.2d at 108.

Judge Diaz noted that

> Mississippi Code Annotated Section 41-29-139(a) (Supp. 1999) sets forth the penalty for any person knowingly or intentionally transferring or possessing with intent to transfer a controlled substance. Under subsection (b)(1), violators of subsection (a) who possess more than an ounce of marijuana may be imprisoned for not more than thirty years and fined at least $5000 and not more than $1,000,000.

> Mississippi Code Annotated Section 41-29-139(c)(2)(C) states in part that any person knowingly or intentionally possessing more than thirty grams but less than 250 grams (of marijuana) may be fined not more than $1,000, or confined in the county jail for not more than one year, or both, or fined not more than $3,000, or imprisoned for not more than three years, or both. [Appendix 41-42]

Judge Diaz then found that

> . . . Meek was not giving away "free samples of drugs" as the majority suggests; he was trying to conceal evidence, which is a different crime altogether. Even if Meek were attempting to share his marijuana with Hemby, he would not be guilty of possession with intent to transfer since the Mississippi Supreme Court, in cases similar to Meek's, has remanded for re-sentencing on the lesser-included-offense of possession where the proof was insufficient to support a charge of possession with intent to transfer. . . . (Citations omitted) [Appendix 42]

Judge Diaz concluded his dissenting opinion by stating:

> The proof of intent to transfer is insufficient and cannot stand under the facts of this case. This case should be reversed on possession with intent to transfer, but affirmed and remanded for resentencing on possession alone. [Appendix 42]

Since the Court of Appeals was evenly divided, Meek's conviction and sentence were affirmed.

Meek filed a Motion for Rehearing on February 22, 2000. In moving the Court to reconsider the majority opinion in light of the authorities cited by the dissent, Meek argued that:

> Under Mississippi case law, the Court must look closely at the individual circumstances in each case. In numerous cases the change of possession of a small amount of drugs is not considered a transfer. In this case there was clearly no transfer of drugs under the statute.

Motion for Rehearing, p. 3. Meek concluded his motion by arguing that "[t]he proof of ***intent to transfer*** – under the factual circumstances of this case – is lacking." *Id.* p. 4.

Meek's motion for rehearing was denied on May 2, 2000.

On May 16, 2000, Meek filed a petition for writ of certiorari in the Supreme Court of Mississippi. The questions Meek presented for review were framed as follows:

> Questions presented for the Court to review is the proper interpretation of Mississippi statute § 41-29-139(a)(1) Mississippi Code of 1972 as amended as to the proper definition and nature of a "transfer" for purposes of said statute and the application of the definition (statutory intent) to the facts in this case.

Petition for Writ of Certiorari From the Court of Appeals of Mississippi, p. 1.

The Constitutional and statutory provisions involved were stated as:

> Petitioner, March Meek, would request this Honorable Court to review the application of Mississippi Statute § 41-29-139(a)(1) to the facts and circumstances as presented in this case to decide if in fact a transfer occurred for purposes of the statute or (if) in fact the case involved a possession.

Petition for Writ of Certiorari From the Court of Appeals of Mississippi, p. 2.

In his Statement of the Case, Meek noted that

> There is no case law of any kind in Mississippi jurisdiction that would describe this as a transfer. Nor is there any case that spoke specifically to factual circumstances similar to this one. Therefore, Mr. Meek asserts that this request for certiorari hereby creates an issue of first impression for the Mississippi Supreme Court to finally adjudicate and place on the record, to-wit:
>
> > "Is an alleged attempt to transfer a controlled substance made under circumstances such as an automobile accident the type of action which § 41-29-139(a)(1) would define as transfer."

Petition for Writ of Certiorari From the Court of Appeals of Mississippi, p. 5.

Under "REASONS FOR GRANTING THE PETITION," Meek argued that:

> It is the proper jurisdiction of the Mississippi Supreme Court to interpret a statute under the factual situation as presented here and to render in fact an opinion from the highest Court in the State of Mississippi as to the interpretation of § 41-29-139(a)(1) in order to guarantee that this

> issue is litigated by the Court since it presents in the mind of counsel and the petitioner, March Meek, an issue of first impression for this Court.

Petition for Writ of Certiorari From the Court of Appeals of Mississippi, p. 7.

The Mississippi Supreme Court granted Meek's petition for writ of certiorari on August 20, 2000.

On April 5, 2001, the Mississippi Supreme Court, in a 5-3 decision, reversed Meek's conviction. The majority opinion, by Judge McRae, joined by Judges Pittman, Banks, Waller and Easley, summarized Meek's case as follows:

> On a petition for writ of certiorari from a 5-5 decision by the Court of Appeals, we granted certiorari to consider whether the Court of Appeals improperly interpreted the transfer statute concerning marijuana. March Meek was convicted of transfer of marijuana after he handed a shaving kit containing marijuana to a good Samaritan at the scene of an accident. He was sentenced to thirty years imprisonment with twenty years suspended. The Court of Appeals affirmed the conviction and sentence by a 5-5 vote. **Meek v. State**, No. 97-KA-01557-COA (Miss.Ct.App. Feb. 8, 2000). Meek filed a petition for writ of certiorari which we granted. He claims that the evidence was insufficient to support the conviction and that the Court of Appeals improperly interpreted the transfer statute. We find that Meek's conduct does not amount to a transfer under the distribution statute. However, we find that the evidence sufficiently shows that Meek did possess the marijuana. We therefore reverse the judgment of the Court of Appeals and the Lincoln

> County Circuit Court, and we remand this matter to the circuit court for sentencing on possession alone. [Appendix 9, 10]

The majority opinion further stated that:

> We find the present factual situation has never before been squarely presented in this Court. We have a situation in which the defendant momentarily passed the contraband to another presumably in an effort to dispose of it before law enforcement officers arrived. We find that the factual situation here does not amount to a transfer under the distribution statute. We hold that while the activity here may have been an attempt to conceal evidence, it was not a criminal transfer (since) it was never shown that Hemby intended to take possession or accept a "transfer" of a controlled substance. We therefore reverse the conviction for transfer of marijuana. [Appendix 16]

Judge Smith, joined by Judges Mills and Cobb, dissented. After discussing the definitions of the words "transfer", "deliver" and "distribute" at length, Judge Smith stated that all that was required to sustain a conviction under § 41-29-139(a) was proof that a transfer took place and that it was clear that a transfer did take place in Meek's case. Judge Smith concluded his dissenting opinion as follows:

> Meek was aware of the character and the presence of the marijuana, and he intentionally transferred it to another person with the intention of relinquishing possession and control of it. For this reason, I respectfully dissent. [Appendix 19, 20]

On October 18, 2001, the State's motion for rehearing was granted and the original opinions were withdrawn. Judge Smith wrote the Court's opinion which affirmed Meek's conviction. Judges Pittman, Mills, Waller, Cobb, and Easley concurred. Judge McRae dissented without a separate written opinion and Judges Banks and Diaz did not participate.

In finding that the evidence was sufficient to sustain Meek's conviction, Judge Smith again focused on the definitions of the words transfer, deliver and distribute and held that:

> There was sufficient evidence in this case that Meek did in fact have knowledge that marijuana was in his shaving kit. Furthermore, Meek's actions in handing the shaving kit containing the marijuana to Hemby constitute a transfer under the distribution statute. Therefore, judgments of the Court of Appeals and the Lincoln County Circuit Court are affirmed.

Meek v. State, 806 So.2d 236, 240 (Miss. 2002).

Meek's petition for rehearing was denied on January 24, 2002.

REASONS FOR GRANTING THE WRIT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FORBIDS A STATE COURT FROM UPHOLDING A CONVICTION OBTAINED UNDER A STATUTE WHICH FAILS TO PROVIDE FAIR WARNING THAT A PERSON COULD BE PUNISHED BY IMPRISONMENT FOR TEN TIMES THE AMOUNT OF TIME AN ORDINARY PERSON WOULD THINK HE COULD BE IMPRISONED FOR IF CONVICTED OF VIOLATING THE STATUTE.

When Petitioner Meek put his shaving kit in the back seat of Delinah Chauvin's car on March 2, 1996, he no doubt knew, without any question, that he was violating the law. If it was his shaving kit, and there was 140.9 grams of marijuana in it, then he was committing a crime and since he had previously been sentenced to three years in prison for the sale of marijuana, it can be safely assumed that he knew about what type of sentence could be imposed on him if, for some reason, a Mississippi law enforcement officer opened his shaving kit and found that there was marijuana in it.

Meek ventured out on the highway with the marijuana knowing that he could be sent to prison if he was caught with it in his possession. He was willing to take that risk. However, Meek never dreamed that the risk he was taking could result in him being sentenced to thirty years in prison. Since no one in the State of Mississippi had ever been sentenced to thirty years for possessing such a small amount of marijuana, Meek had no reason to suspect that his conduct could result in such a harsh punishment. Meek no doubt knew, as did Judge Diaz, that the maximum sentence that could have been imposed on him for possession of 140.9 grams of marijuana would

have been three years. See Judge Diaz' dissenting opinion as set forth in Appendix 37-42.

On its face, the statute under which Meek was convicted fails to clearly express what it prohibited. Meek therefore claims that if he had any type warning that Mississippi might penalize him so severely for trying to avoid the punishment he knew could be inflicted upon him if the marijuana was discovered, that warning was far from fair. No ordinary person could discern from the statute that actions such as those taken by Meek after the accident could result in a thirty year prison sentence.

It is well-settled that due process requires that criminal statutes give individuals sufficient notice that their contemplated conduct is unlawful. In *Connally v. General Const. Co.*, 269 U.S. 385, 393 (1926), this Court held that

> The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

269 U.S. at 393. *See also, McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("a fair warning should be given to the

world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear"). Fair warning, therefore, is a right of constitutional dimension, grounded in the due process guarantee requiring that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1965).

In *Bouie,* the defendants, two black college students, were convicted of violating a South Carolina trespass statute for refusing to leave a drugstore restaurant after being told to do so. The language in the statute prohibited entry on the lands of another after notice prohibiting such entry. In affirming the conviction, the South Carolina Supreme Court construed the statute to cover not only the act of entry on the premises of another after notice not to enter, but also the act of remaining on the premises after notice to leave. This Court found that by applying such a construction of the statute to affirm the defendants' convictions, the state punished them for conduct that was not criminal at the time they committed it.

Noting that the South Carolina statute was neither vague nor over broad, this Court nevertheless said that applying the South Carolina Supreme Court's broader construction of the statute would

> produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or over broad, it at least gives a

> potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statue as written will be retroactively brought within it by an act of judicial construction.

Bouie v. City of Columbia, 378 U.S. at 352.

More recently, this Court has held that

> [t]here are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a "statute which either forbids or requires the doing of an act in terms so vague that [women] of common intelligence must necessarily guess at its meaning and differ as to its application." . . . Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered . . . . Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. . . . In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 1225 (1997) (internal citations omitted).

Meek submits that the statute at issue in this case fails all three of the *Lanier* requirements.

VAGUENESS: Ten Mississippi Judges, Diaz, King, Lee, Moore, Thomas, McRae, Banks, Pittman,Waller and Easley, believed that Meek was not guilty of violating § 49-29-139(a); that he should have been convicted and sentenced under § 41-29-139(c)(2)(C). Eleven Mississippi Judges, Southwick, McMillin, Bridges, Irving, Payne, Smith, Mills, Cobb, Pittman, Waller and Easley believed that Meek was guilty of violating § 49-29-139(a). Why the Mississippi judges were so divided had to have been due, at least in part, to the statute's vagueness. In fact, there was so much uncertainty about how the statute should be construed that three of the judges, Pittman, Waller and Easley, initially found that Meek was not guilty of violating the statute but then changed their minds and found, on the same facts and authority, that he was guilty. If Mississippi judges interpret the statute so differently, there is no question that people of common intelligence would guess at its meaning and differ as to its application. By failing to clearly and expressly prohibit conduct such as that at issue here, the statute failed to give fair warning that a person could be sentenced to thirty years in prison for trying to conceal marijuana if, during the attempt, the person tried to hand the marijuana to another person.

RULE OF LENITY: In determining whether § 49-29-139(a) required proof of intent, the split between the Mississippi judges was very close – 11 to 10. A reasonable

interpretation of § 49-29-139(a) is that it does require intent.[2] And although the statute does not expressly state that a person must possess marijuana with the intent to transfer it before he can be convicted of transferring it, it is well settled that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a *mens rea* requirement. *Liparota v. United States*, 471 U.S. 419, 426 (1985). It is equally well settled that "criminal offenses requiring no *mens rea* have a generally disfavored status." *Id.*

The statute was clearly ambiguous and the Mississippi judges who believed a conviction under the statute did not require a showing of intent should have resolved the ambiguity in favor of lenity. *United States v. Bass*, 404 U.S. 336, 347 (1971). This would have ensured that no one could be convicted under the statute who had not received fair warning that conduct such as that at issue here could be punished by imprisonment for thirty years.

NOVEL CONSTRUCTION: In his petition for writ of certiorari in the Mississippi Supreme Court, Meek argued that

> There is no case law of any kind in Mississippi jurisdiction that would describe this as a transfer. Nor is there any case that spoke specifically to factual circumstances similar to this one. Therefore, Mr. Meek asserts that this request for

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[2] In *Morissette v. United States*, 342 U.S. 246, 250 (1951), Justice Jackson said: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

> certiorari hereby creates an issue of first impression for the Mississippi Supreme Court to finally adjudicate and place on the record, to-wit.

Petition for Writ of Certiorari From the Court of Appeals of Mississippi, p. 5. In finding that Meek's conviction should be reversed, Judge McRae noted that "[w]e find the present factual situation has never before been squarely presented in this Court." [Appendix 16]. Since no case similar to Meek's had ever been presented to the Mississippi Supreme Court, the conduct at issue here was such that neither the statute nor any prior judicial decision of the Mississippi courts could have disclosed that such conduct was within the scope of the statute. The final opinion in Meek's case was an "unforeseeable judicial enlargement of a criminal statute." *Bouie v. City of Columbia*, 378 U.S. at 354. Its retroactive application to Meek caused him to be convicted under a statute that did not make it reasonably clear that his conduct was criminal. Under such circumstances, applying the statute to Meek violated the Ex Post Facto Clause of the Constitution. Art. I, Section 10.

In *Douglas v. Buder*, 412 U.S. 430 (1973), the defendant was placed on probation. One of the conditions of his probation was that he would promptly report any "arrest" to his probation officer. His probation was revoked after he failed for eleven days to report a traffic citation. This Court noted that the statutes in question defined arrest as an "actual restraint" or taking into "custody." The state argued that the judge presiding over the revocation had determined that, for purposes of state law, a traffic citation was the equivalent of an arrest. In response, this Court said that neither the judge nor the state supreme court had ruled a traffic citation the equivalent of arrest,

and that no prior decisional law was cited to support such a construction. Moreover, this Court said even if the state court had declared state law to be that a traffic citation was the equivalent of an arrest, "we would have to conclude that under the rationale of *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), the unforeseeable application of that interpretation in the case before us deprived petitioner of due process." 412 U.S. at 432. See *Cohen v. Katsaris*, 530 F.Supp. 1092, 1096 (N.D. Fla. 1982). There is no more logic in the state court finding in Meek's case that his conduct was a "transfer" prohibited by the statute than the finding in *Buder* that the issuance of a traffic citation was the same as being restrained or taken into custody. Both interpretations were due process violations.

CONCLUSION

Eleven million people in the United States spent eleven billion dollars on marijuana in 1998. The number of marijuana users is about the same as it was in 1988. *Publications Office of National Drug Control Policy, December 2000.*[3] When Meek placed that shaving kit in the back seat of Delinah Chauvin's car, he was taking the risk that millions of people in the United States take every day, the risk that he might be imprisoned, but for a relatively brief period of time, for the crime he was committing. However, Meek was involved in a wreck and ended up with a thirty year sentence. Such is absurd and should be

[3] www.whitehousedrugpolicy.gov/publications/drugfact/american_users_spend/.

offensive to every fair minded citizen in this country, including legislators, judges and prosecutors.

Marijuana users are protected by the Constitution and just like this Court shielded blacks from abuse by state officials during the Civil Rights era, this Court should protect Meek and the millions of other people who use marijuana from the type of prosecutorial overreaching that occurred in this case.

The requested writ of certiorari should be granted so this Court can ensure that no citizen in this country can ever again be convicted of violating any type of criminal statute without fair warning.

Respectfully submitted,

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806 So.2d 236

Supreme Court of Mississippi.

March MEEK

v.

STATE of Mississippi.

No. 97-CT-01557-SCT.

Oct. 18, 2001.
Rehearing Denied Jan. 24, 2002.

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EN BANC.

ON MOTION FOR REHEARING

SMITH, Justice, for the Court.

¶ 1. The motion for rehearing is granted. The original opinions are withdrawn, and this opinion is substituted therefor.

¶ 2. March Meek was convicted of transfer of marijuana in the Circuit Court of Lincoln County after he handed a shaving kit containing marijuana to a good Samaritan at the scene of an accident. He was sentenced to thirty years' imprisonment with twenty years suspended. The conviction and sentence were affirmed by the Court of Appeals by a 5-5 vote. *Meek v. State,* No. 97-KA-01557-COA (Miss.Ct.App. Feb. 8, 2000). We granted Meek's petition for writ of certiorari to consider whether

the Court of Appeals improperly interpreted the transfer statute concerning marijuana.

STATEMENT OF THE FACTS

¶ 3. March Meek was a passenger in Delinah Chauvin's car when they were involved in a serious accident. Before entering the car, Meek had placed several items in the back seat of the vehicle. One of those items was a shaving kit. Both Chauvin and Meek were injured in the accident. Meek was unable to get out of the vehicle until help arrived.

¶ 4. Phillip Hemby arrived at the scene and offered to help the victims. Hemby testified that when he approached Meek's side of the car, Meek handed him a shaving kit and asked him to "get rid of this." Hemby said that he was suspicious of the contents of the shaving kit. There was testimony that he could smell marijuana. Hemby testified that he immediately handed the kit back to Meek. Hemby then left to help the driver of the other vehicle.

¶ 5. Chauvin testified that Meek asked her if she could get out of the car because he wanted her to dispose of something. She was unable or unwilling to discard the contraband. When Hemby returned to Chauvin's car, he saw the shaving kit lying on the shoulder of the road on Meek's side of the car, approximately 12 to 15 feet from the passenger door. Hemby testified that he kicked the shaving kit into a roadside ditch to preserve the kit as evidence for law enforcement officers. Hemby later directed a highway patrolman to the shaving kit on the side of the road. The officer opened it and found what appeared to be marijuana inside. An analysis by the Mississippi Crime

Laboratory revealed that the kit contained over 140 grams of marijuana.

¶ 6. The indictment charged that Meek "did wilfully, unlawfully, feloniously, and knowingly, transfer more than one ounce of marihuana . . . to one Phillip Hemby." The jury found Meek guilty of transferring the controlled substance. He was sentenced as a habitual offender to thirty years' imprisonment with twenty years suspended. His conviction and sentence were affirmed by the Court of Appeals by a vote of 5-5. We granted March's petition for writ of certiorari.

DISCUSSION OF LAW

¶ 7. In his petition for writ of certiorari, Meek raises two issues. He attacks the sufficiency of the evidence that he knew that marijuana was in the kit. He also argues that the conduct here, even if sufficiently proven, was not a transfer within the meaning of the statute.

I. Sufficiency of the evidence.

¶ 8. Meek claims that there was not sufficient evidence that he knew that the drugs were in the shaving kit when he handed it to Hemby. He also states that "it was questionable as to whether he [Hemby] actually took the bag or not." However, the facts reveal nothing questionable as to whether Hemby actually took possession of the shaving kit. Hemby testified that Meek handed him the shaving kit and asked him if he would "get rid of this for him" when Hemby approached the passenger window of Chauvin's car. Chauvin also testified that Meek had asked her to dispose of the shaving kit. Meek admitted that the

shaving kit in which the drugs were found was his. He also admitted that he owned the toiletries found in the shaving kit. Finally, he admitted that he had placed the kit in the back seat of Chauvin's car before the wreck. Meek argued that someone else could have placed the marijuana in the kit between the time when he put it in the car and when the marijuana was found in the kit after it had been located in the roadside ditch. Meek and Chauvin had stopped at a friend's house for approximately an hour before the wreck. The defense claimed that one of the people at the house could have placed the drugs in the kit during that time period. Both the Court of Appeals opinions found that there was sufficient evidence that Meek had possession of the marijuana.

¶ 9. When reviewing a challenge to the sufficiency of the evidence, this Court considers all of the evidence in the light most consistent with the verdict, giving the State the benefit of all inferences favorable to the verdict. *Jones v. State,* 669 So.2d 1383, 1388 (Miss.1995). When the evidence before the jury is such that reasonable jurors could have found the defendant guilty, the verdict is beyond our authority to disturb. *Taylor v. State,* 672 So.2d 1246, 1255 (Miss.1996). After reviewing the evidence, we find that the Court of Appeals plurality correctly found that there was sufficient evidence in this case that Meek did in fact have knowledge marijuana was in his shaving kit.

II. Whether the conduct here amounts to a transfer within the statute.

¶ 10. Meek was indicted for transferring the marijuana to Hemby when he handed the shaving kit containing the marijuana through the car window following the

accident. The trial court concluded that "to transfer means to pass from one hand to the other." Meek argues that his actions did not amount to a transfer within the meaning of the relevant statute. We disagree.

¶ 11. *Miss.Code Ann. § 41-29-139 (Supp.2001)* provides in part:

> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
>
> (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense a controlled substance . . . .

A definition of "transfer" is not statutorily provided. However, there are two words defined in the act that aid in the understanding of what "transfer" means. *Miss.Code Ann. § 41-29-105 (Supp.2001)* provides in part:

> (h) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.
>
> * * *
>
> (*l*) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

¶ 12. These terms are virtually interchangeable. We have analyzed the broad language contained in these definitions as being intended "to relieve the state of the task, oftentimes difficult if not impossible, of proving the consideration paid for the contraband, its intentions being

to thwart the exchange or transfer of the substance whether accompanied by consideration or not." *Wilkins v. State,* 273 So.2d 177 (Miss.1973). As the Court of Appeals plurality explained, the definitions indicate that "the exchange of consideration, the intent to place the contraband in commerce, and even the success of the transfer are irrelevant to a factual determination of transfer or delivery." (Slip op. at ¶ 22).

¶ 13. Meek argues that his actions did not constitute a transfer because he did not intend to place the contraband in commerce nor intend to distribute the substance for economic gain. However, we have held that "distributing" a controlled substance as defined in the statute "includes transactions which are sales as well as transactions which may not be considered sales." *Rogers v. State,* 599 So.2d 930, 934 (Miss.1992). The intent of the deliver and transfer of narcotics statute is "to thwart the exchange or transfer of the substance whether accompanied by consideration or not." *Wilkins v. State,* 273 So.2d 177 (Miss.1973).

¶ 14. A transfer is a change of possession from one person to another. *See Commonwealth v. McCue,* 338 Pa.Super. 117, 487 A.2d 880, 883 (1985). Also, a transfer is any act by which the holder of an object delivers it to another with the intent of passing whatever rights he has in the latter. *See United States v. Nutter,* 13 M.J. 803, 803-04 (A.F.C.M.R.1981). The word "deliver" has been defined by this Court to be the equivalent of the word "transfer." *Evans v. State,* 460 So.2d 824, 828 (Miss.1984). In applying the term "deliver" to the facts of this case, it is clear from this term's definition that Meek "actually, constructively, or attempted to transfer" his bag from himself to Hemby, who was immediately aware that the shaving kit

contained marijuana. The shaving kit clearly passed from Meek's hands to another's, while Meek had the requisite intent to get this item out of his possession. There is no logical conclusion other than that Meek knew what was in the shaving kit, and he intended to conceal it by getting it out of his hands into the hands of another. Hemby kicked it into the side of the road in order to make law enforcement officers aware of the contents being marijuana.

¶ 15. The Court of Appeals correctly held that "to prove a transfer there is no need to show an intent to sell, as is necessary under an indictment for possession with intent to sell." (Slip op. at 9). We find that the only intent necessary is an intent to relinquish possession and control. The intent of the recipient is immaterial. All that is required is that Meek, the transferor, have knowledge of the character and presence of the controlled substance and that he intentionally transfer it to another with the intent to part with possession and control. That is exactly what occurred here.

¶ 16. Meek also argues that because Hemby never took the marijuana but immediately handed it back to Meek, the transfer was frustrated and never occurred. We have stated that "[p]ossession, no matter how fleeting, is sufficient to sustain a conviction [for possession of cocaine with intent to deliver]." *Berry v. State,* 652 So.2d 745, 751 (Miss.1995). Likewise, the fact that the handling by Hemby was momentary should not be a factor in determining whether there was a transfer in fact.

CONCLUSION

¶ 17. There was sufficient evidence in this case that Meek did in fact have knowledge that marijuana was in

his shaving kit. Furthermore, Meek's actions in handing the shaving kit containing the marijuana to Hemby constitute a transfer under the distribution statute. Therefore, judgments of the Court of Appeals and the Lincoln County Circuit Court are affirmed.

¶ 18. **JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED.**

PITTMAN, C.J., *MILLS, WALLER, COBB* and EASLEY, JJ., CONCUR. McRAE, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. BANKS, P.J., and DIAZ, J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 97-CT-01557-SCT

MARCH MEEK

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	11/12/1997
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	LINCOLN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOSEPH A. FERNALD, JR.
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: BILLY L. GORE
DISTRICT ATTORNEY:	DUNN LAMPTON
NATURE OF THE CASE:	CRIMINAL – FELONY
DISPOSITION:	REVERSED AND REMANDED – 04/05/2001
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC

McRAE, PRESIDING JUSTICE, FOR THE COURT:

¶1. On a petition for writ of certiorari from a 5-5 decision by the Court of Appeals, we granted certiorari

to consider whether the Court of Appeals improperly interpreted the transfer statute concerning marijuana. March Meek was convicted of transfer of marijuana after he handed a shaving kit containing marijuana to a good Samaritan at the scene of an accident. He was sentenced to thirty years imprisonment with twenty years suspended. The Court of Appeals affirmed the conviction and sentence by a 5-5 vote. ***Meek v. State***, No. 97-KA-01557-COA (Miss. Ct. App. Feb. 8, 2000). Meek filed a petition for writ of certiorari which we granted. He claims that the evidence was insufficient to support the conviction and that the Court of Appeals improperly interpreted the transfer statute. We find that Meek's conduct does not amount to a transfer under the distribution statute. However, we find that the evidence sufficiently shows that Meek did possess the marijuana. We therefore reverse the judgments of the Court of Appeals and the Lincoln County Circuit Court, and we remand this matter to the circuit court for sentencing on possession alone.

FACTS

¶2. Mark Meek was a passenger in Delinah Chauvin's car when they were involved in a serious accident. Before entering the car, Meek had placed several items in the back seat of the vehicle. One of those items was a shaving kit. Both Chauvin and Meek were injured in the accident. Meek was unable to get out of the vehicle until help arrived.

¶3. Phillip Hemby arrived at the scene and offered to help the victims. Hemby testified that when he approached Meek's side of the car, Meek handed him a

shaving kit and asked him to "get rid of this." Hemby said that he was suspicious of the contents of the shaving kit. There was testimony that he could smell marijuana. Hemby testified that he immediately handed the kit back to Meek. Hemby then left to help the driver of the other vehicle.

¶4. Chauvin testified that Meek asked her if she could get out of the car because he wanted her to dispose of something. She was unable or unwilling to discard the contraband. When Hemby returned to Chauvin's car, he saw the shaving kit lying on the shoulder of the road on Meek's side of the car, approximately 12 to 15 feet from the passenger door. Hemby testified that he kicked the shaving kit into a roadside ditch to preserve the kit as evidence for law enforcement officers. Hemby later directed a highway patrolman to the shaving kit on the side of the road. The officer opened it and found what appeared to be marijuana inside. An analysis by the Mississippi Crime Laboratory revealed that the kit contained over 140 grams of marijuana.

¶5. The indictment charged that Meek "did wilfully, unlawfully, feloniously, and knowingly, transfer more than one ounce of marihuana . . . to one Phillip Hemby." The jury found Meek guilty of transferring the controlled substance. He was sentenced as a habitual offender to thirty years imprisonment with twenty years suspended. His conviction and sentence were affirmed by the Court of Appeals by a vote of 5-5. Meek then filed a petition for writ of certiorari which was granted by this Court.

ANALYSIS

¶6. In his petition for writ of certiorari, Meek raises two issues. He attacks the sufficiency of the evidence that he knew that marijuana was in the kit. He also argues that the conduct here, even if sufficiently proven, was not a transfer within the meaning of the statute.

I. Sufficiency of the evidence.

¶7. Meek claims that there was not sufficient evidence that he knew that the drugs were in the shaving kit when he handed it to Hemby. He also states that "it was questionable as to whether he [Hemby] actually took the bag or not." Hemby testified that Meek handed him the shaving kit and asked him if he would "get rid of this for him" when Hemby approached the passenger window of Chauvin's car. Chauvin also testified that Meek had asked her to dispose of the shaving kit. Meek admitted that the shaving kit in which the drugs were found was his. He also admitted that he owned the toiletries found in the shaving kit. Finally, he admitted that he had placed the kit in the back seat of Chauvin's car before the wreck. Meek argued that someone else could have placed the marijuana in the kit between the time when he put it in the car and when the marijuana was found in the kit after it had been located in the roadside ditch. Meek and Chauvin had stopped at a friend's house for approximately an hour before the wreck. The defense claimed that one of the people at the house could have placed the drugs in the kit during that time period. Both the Court of appeals majority and the dissent found that there was sufficient evidence that Meek had possession of the marijuana.

¶8. When reviewing a challenge to the sufficiency of the evidence, this Court considers all of the evidence in the light most consistent with the verdict, giving the State the benefit of all inferences favorable to the verdict. ***Jones v. State***, 669 So.2d 1383, 1388 (Miss.1995). When the evidence before the jury is such that reasonable jurors could have found the defendant guilty, the verdict is beyond our authority to disturb. ***Taylor v. State***, 672 So.2d 1246, 1255 (Miss.1996). After reviewing the evidence, we find that the Court of appeals correctly found that there was sufficient evidence in this case that Meek did in fact have knowledge marijuana was in his shaving kit.

II. Whether the conduct here amounts to a transfer within the statute.

¶9. The more difficult question is whether Meek's conduct constitutes a transfer under the controlled substances act. Meek was indicted for transferring the marijuana to Hemby when he handed the shaving kit containing the marijuana through the car window following the accident. The trial court concluded that "to transfer means to pass from one hand to the other." Meek contends that his actions did not amount to a transfer within the meaning of the relevant statute. Miss. Code Ann. § 41-29-139 (a) provides in part:

> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
>
> (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance . . .

Miss. Code Ann. § 41-29-105 (Supp. 2000) provides definitions for terms found in the controlled substances section. Although no definition of "transfer" is provided, the following definitions in that statute are enlightening:

> (h) "Delivery" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.
>
> . . .
>
> (1) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

Id.

¶10. The Court of Appeals discussed the definition of "transfer" and compared the terms "distribute" and "deliver." The Court of Appeals found that the terms were for the most part interchangeable. This finding is supported by the case law. The Court has equated the general terms "transfer" and "deliver". ***Evans v. State***, 460 So.2d 824, 828 (Miss.1984). "The word 'distribute' as stated in the statute and the indictment includes transactions which are sales as well as transactions which may not be considered sales." ***Rogers v. State***, 599 So.2d 930, 934 (Miss.1992). The intent of the delivery and transfer of narcotics statute is "to thwart the exchange or transfer of the substance whether accompanied by consideration or not." ***Wilkins v. State***, 273 So.2d 177 (Miss.1973).

¶11. In finding that a transfer within the meaning of the statute had occurred, the Court of Appeals held that:

> What occurred here is equally amenable to the legislature's heightened scrutiny as would be a person's attempt to sell the single rock of crack cocaine that he had initially purchased only for personal use. Further, if he decided that instead of selling, he would give it away to a known user, that too is beyond mere possession. And finally, if as here a user decides to give the drugs to someone who may be unaware of what he is getting, but the accused is willing to risk that this person will be a user or become one because of the opportunity, it is within the language of this statute to consider that more than possession. Quite simply, the risk to society is magnified when a criminal moves from keeping drugs to himself and attempts to transfer drugs to others.

(***Meek***, Paragraph 32 at page 7).

¶12. Both the Court of Appeals majority and dissent cite ***Stringfield v. State***, 588 So. 2d 438, 439 (Miss. 1991). There, the Court discussed a case in which the defendant had shared crack cocaine with two cohorts. While being arrested on another charge, the drugs were found on Stringfield. He admitted that the drugs were in his possession and that he had distributed some of the crack to his friends. However, Stringfield was not charged with the actual acts of distribution to his friends but with possession with intent to distribute in the future. The Court held that there was insufficient proof of intent to distribute. In dicta, the Court stated:

> If a smoker gives an acquaintance a few cigarettes from his package, or a pack from his carton, does that mean he possessed the tobacco with an intent to distribute? Clearly he is guilty

> of actually distributing the tobacco he gives his friend, but does this mean he possessed the pack, or carton, with an intent to sell or distribute? That question, however, must wait another day for an answer, because – while almost – it is not quite presented here.

Id. at 439. We find ***Stringfield*** to be distinguishable for reasons discussed below.

¶13. This Court has held that it is not necessary for the transferor to make a profit or that there be consideration in order for the transaction to constitute a transfer or distribution under the statute. ***Rogers v. State***, 599 So.2d 930 (Miss.1992); ***Turner v. State***, 573 So.2d 1340 (Miss.1990); ***Minor v. State***, 482 So.2d 1107 (Miss.1986). ***Boone v. State***, 291 So.2d 182, 184 (Miss.1974). However, in each of those cases and in ***Stringfield***, there was a knowing drug transaction between the transferor and the recipient. In the case at hand, the recipient did not knowingly and willingly enter a drug transaction.

¶14. We find that the present factual situation has never before been squarely presented in this Court. We have a situation in which the defendant momentarily passed the contraband to another presumably in an effort to dispose of it before law enforcement officers arrived. We find that the factual situation here does not amount to a transfer under the distribution statute. We hold that while the activity here may have been an attempt to conceal evidence, it was not a criminal transfer it was never shown that Hemby intended to take possession or accept a "transfer" of a controlled substance. We therefore reverse the conviction for transfer of marijuana.

¶15. This Court has allowed sentencing on a lesser-included offense when the greater offense is unsupported by the evidence. ***Clark v. State***, 756 So.2d 730 (Miss.1999); ***Shields v. State***, 722 So.2d 584 (Miss.1998). We find that the evidence in this matter does support a conviction for the lesser-included offense of possession of marijuana and we remand this matter to the trial court for sentencing on possession.

¶16. For these reasons, the judgments of the Court of Appeals and the Lincoln County Circuit Court are reversed, and this case is remanded to the Circuit Court for entry of a judgment convicting March Meek of the crime of possession of marijuana and sentencing him for that conviction.

¶17. **REVERSED AND REMANDED.**

PITTMAN, C. J., BANKS, P. J., WALLER AND EASLEY, JJ., CONCUR. SMITH, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MILLS AND COBB, JJ. DIAZ, J., NOT PARTICIPATING.

SMITH, JUSTICE, DISSENTING:

¶18. I recognize that this type of case has not been squarely addressed by this Court. The majority states that Meek's actions did not amount to a "transfer in fact," and that his actions do not fall within the Controlled Substances Act (the Act). I respectfully dissent believing that Meek's actions did, in fact, equate to a transfer in fact and accordingly fall within the purview of the Act.

¶19. There is indeed no definition of the word "transfer" found in the Act. However, there are two words defined in the Act that aid in the understanding of what "transfer" means. The words "deliver" and "distribute" are defined. The word "deliver" has been defined by this Court to be the equivalent of the word "transfer." ***Evans v. State***, 460 So. 2d 824, 828 (Miss. 1984). In applying the term "deliver" to the facts of this case, it is clear from this term's definition that Meek "actually, constructively, or attempted to transfer" his bag of marijuana from himself to a supposed 'good Samaritan.'" *See* ***id***. It appears that this "good Samaritan" was immediately aware that the shaving kit contained marijuana. The Samaritan testified that Meek handed him the shaving kit and asked him to get rid of it. When the Samaritan took the bag from Meek, he immediately handed it back to him because the kit contained marijuana. The woman passenger also testified that Meek said he had something in the car that needed to be removed. The shaving kit that contained marijuana clearly passed from Meek's hands to another's, while Meek, who had been injured in an automobile wreck, had the requisite intent to get this item out of his possession. Clearly, Meek knew what was in the shaving kit, and he intended to get it out of his hands into the hands of another.

¶20. The majority fails to address several cases that the State raises which aid in clarifying what a "transfer" is. A transfer is a change of possession from one person to another. ***See Commonwealth v. McCue***, 487 A.2d 880, 883 (Pa. Super. Ct. 1985). Also, a transfer is any act by which the holder of an object delivers it to another with the intent of passing whatever rights he has

in the latter. *See* ***United States v. Nutter***, 13 M.J. 803, 803-04 (A.F.C.M.R. 1981). Meek did all of the above. He passed possession of his shaving kit to another with the intent to pass his rights away.

¶21. Regarding the term "distribute," the majority cites to several cases in which both parties involved in drug transactions knew that the transaction was taking place. **See** ***Turner v. State***, 573 So.2d 1340 (Miss. 1990); ***Minor v. State***, 482 So.2d 1107 (Miss. 1986); ***Boone v. State***, 291 So.2d 182, 184 (Miss. 1974). The majority additionally points to ***Rogers v. State***, 599 So.2d 930, 934 (Miss. 1992), where this Court held that the word "distribute" includes sale and non-sale transactions. The majority states that because the good Samaritan did not "knowingly and willingly" enter into this drug transaction, the transaction at issue is not a transfer in fact and does not fall within the Act. The majority claims that Meek's "intent to distribute" is the key element that triggers the Act, and the majority finds that he had no intent to distribute, or "sell", the marijuana for another's use. It is important to note that the Act does not state that it only applies to persons who "distribute" or sell drugs for another's use. The Act states that a person has violated the law when they have intentionally or knowingly sold, bartered, transferred, distributed, dispensed, or possessed drugs with the intent to do all of the above. Miss. Code Ann. § 41-29-139(a). Distribution, or the intent to sell drugs, is part of the Act, but is not the issue in this case. The issue is whether a "transfer in fact" took place, and it is clear that it did.

¶22. Meek was aware of the character and the presence of the marijuana, and he intentionally transferred

it to another person with the intention of relinquishing possession and control of it. For this reason, I respectfully dissent.

MILLS AND COBB, JJ., JOIN THIS OPINION.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
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May 2, 2000

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 2nd day of May, 2000.

Court of Appeals Case # 97-KA-01557-COA
Trial Court Case # 12127

March Meek v. State of Mississippi

Appellant's Motion for Rehearing is denied. King, P.J, Lee, Moore, and Thomas, JJ. would grant.

*NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS*

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-KA-01557-COA

MARCH MEEK **APPELLANT**
v.
STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT: 11/12/1997

TRIAL JUDGE: HON. KEITH STARRETT

COURT FROM WHICH APPEALED:
LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:
JOSEPH A. FERNALD JR.

ATTORNEY FOR APPELLEE:
OFFICE OF THE ATTORNEY GENERAL
BY: BILLY L. GORE

DISTRICT ATTORNEY: DIANE Y. JONES

NATURE OF THE CASE: CRIMINAL – FELONY

TRIAL COURT DISPOSITION:
TRANSFER OF MORE THAN ONE OUNCE OF MARIHUANA (HABITUAL OFFENDER); SENTENCED TO 30 YEARS IN MDOC, THE LAST 20 YEARS TO BE SERVED ON POST RELEASE SUPERVISION; PAY COURT COST AND $2000 FINE

DISPOSITION: AFFIRMED – 02/08/2000

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED:

EN BANC

SOUTHWICK, P.J., FOR THE COURT:

¶1. March Meek was convicted by a Lincoln County Circuit Court jury of unlawful transfer of more than one ounce of marihuana. On appeal Meek alleges that his prosecution violated double jeopardy principles and that the evidence either was insufficient to support the verdict or at least was overwhelmingly contrary to it. We disagree with these contentions and affirm.

FACTS

¶2. On Saturday, March 2, 1996, twenty-eight-year-old March Meek asked a female friend, eighteen-year-old Delinah Chauvin, to drive him to the home of a friend, where he planned to spend the night. Upon entering Chauvin's car, Meek placed several items on the passenger side of the back seat, including a pair of jeans, a shirt, tennis shoes and a shaving kit. Later that evening, Chauvin's car was involved in a head-on collision with another car speeding in the wrong lane of travel. Both Chauvin and Meek were injured, Meek suffering a dislocated left elbow and shoulder, a broken left hip, a broken left leg and ankle and a severely lacerated right arm.

¶3. The first person to arrive on the scene was Phillip Hemby, a Baptist preacher and chicken farmer. He testified that when he approached Meek's side of the car, Meek handed him a shaving kit and asked him to dispose of it for him. Hemby said that he was suspicious of the contents of the shaving kit and handed it back to Meek. Then Hemby went to help the driver of the other car. Chauvin later testified that Meek asked her if she could get out of the car because there was something that needed to be

disposed of, but she was unable to move at the time, being pinned under the car's dashboard. When Hemby later returned to check on Meek and Chauvin, he saw the shaving kit lying on the shoulder of the road on Meek's side of the car and kicked it into a ditch to preserve it as evidence for law enforcement officers.

¶4. After a state highway patrolman secured the scene of the accident and dispatched the injured to the hospital via ambulance, Hemby pointed out the shaving kit to the officer. The officer opened it and found that it contained marihuana, along with a toothbrush and some shampoo. He locked the shaving kit in the trunk of his car, where it stayed until he delivered it to the Mississippi Crime Laboratory in Jackson for identification and analysis on Monday morning, two days later.

¶5. Meek was indicted and was scheduled to be tried on January 15, 1997. On the morning of the trial prior to the selection of a jury, Chauvin informed the prosecution that she intended to change her story and to testify that the marihuana was hers. The defense would not agree to the State's request for a continuance. The State then orally moved for a *nolle prosequi.* The court granted the request. The Appellate record does not contain an order dismissing this first indictment, but testimony describing these events was later taken at a hearing on Meek's double jeopardy claim.

¶6.Chauvin subsequently recanted her recantation and stated that she had been persuaded by Meek, whom she had been dating, to claim ownership of the marihuana because, as a first-offender, she believed that she would only get probation. With Chauvin once more ready to

testify against Meek, the State obtained a new indictment. Meek was brought to trial on November 3, 1997.

¶7. At the beginning of the second trial, Meek moved to dismiss, asserting that the second indictment violated his double jeopardy rights. The motion was overruled. The jury found Meek guilty of transferring the controlled substance. Meek's appeal was deflected to this Court.

DISCUSSION

I. *Double Jeopardy*

¶8. The threshold issue is double jeopardy, since a resolution on it favorable to Meek will make the remaining issues moot. Meek argues that jeopardy attached at the first trial date of January 15, 1997. The court had questioned the veniremen and administered their oath before turning them over to the State for voir dire. It was at that point that the State sought a continuance because of the change in one of its witness's potential testimony.

¶9. The United States Supreme Court has held that jeopardy attaches in a jury trial when the jury is empaneled and sworn, holding that this is an integral part of the fifth Amendment applicable to the states by the Fourteenth Amendment. *Crist v. Bretz,* 437 U.S. 28, 37-38 (1978).

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury .... It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury

> should not be discharged until it had completed its solemn task of announcing a verdict.

Id at 35-36. This principle has been acknowledged in state jurisprudence. *McGraw v. State,* 688 So.2d 764, 767 (Miss. 1997).

¶10. In the present case, a venire from which a jury of twelve still needed to be selected had been asked general questions by the court. The parties' individual voir dire had not commenced and the jurors who would hear this particular case had not been chosen. To use the terms of *Crist,* a jury was never "banded together" and it never became a "particular tribunal" for the purpose of hearing evidence. *Crist,* 437 U.S. at 35-36. Therefore, the constitutional guarantee against double jeopardy never attached and could not have been violated.

¶11. We need only briefly address the separate issue of the effect of the order granting a *nolle prosequi.* An entry of a *nolle prosequi* ends a particular case on the docket, but absent prejudice it does not bar prosecution for the same offense if commenced in the court where the case originated. *Beckwith v. State,* 707 So.2d 547, 569 (Miss. 1998). Likewise, no prejudice to Meek resulted from the *nolle prosequi* of the first indictment since the second indictment was tried in the same court in which the first had been scheduled to commence, and all material evidence had been preserved from the prior proceeding.

II. *Transfer Within the Meaning of the Statute*

¶12. Meek argues that the State failed to prove the essential elements of the offense. The State relied upon this statute to indict Meek for transfer of a controlled substance:

> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
>
> (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance . . . .

Miss. Code Ann. § 41-29-139(a)(1) (Supp. 1999).

¶13. Meek's argument focuses first on whether the State proved that he knowingly possessed the marihuana, if he did not know of the marihuana, then he may not have made a wilful transfer. Second, he asserts that there was no transfer. Finally, Meek argues that the location of the word "intent" in the statute means that the transfer must be "a transaction that places the controlled substance in commerce for use or pecuniary gain." We look at each argument separately.

A. Proof of Possession

¶14. Meek agrees that marihuana was found in his shaving bag, and that he placed that bag in Chauvin's car. However, he argues that the bag did not remain in his sole dominion and control leaving a reasonable doubt as to who placed the marihuana in the bag. Meek testified at trial that he was not aware that his shaving kit contained marihuana, and he denied trying to retrieve the kit after the wreck and attempting to hand it to Hemby or throwing it to the side of the road.

¶15. To determine whether there was sufficient evidence to sustain a conviction, we consider all of the evidence in the light most consistent with the verdict, giving that

verdict the benefit of all favorable inferences that may reasonably be drawn from the evidence. Only if we conclude that under that view of the evidence, reasonable jurors could not have found guilt beyond a reasonable doubt, will we reverse. *McFee v. State,* 511 So.2d 130, 133-34 (Miss. 1987).

¶16. Meek admitted ownership of the shaving kit in which the drugs were found, and also that he owned the small bottle of shampoo and the toothbrush found in the shaving kit. He admitted placing the kit in the back seat of Chauvin's car. The pair then drove to the house trailer of one of Chauvin's friends. They were there for an hour, then began their brief automobile ride that ended with a collision. Though the vehicle was allegedly outside Meek's view for an hour and Meek's appellate brief, without any supporting testimony that we can find in the record, alleges the car was unlocked, it was for the jury to decide whether another person for reasons unknown secreted marihuana in his shaving kit during his stay at the trailer. In addition, both Chauvin and Hemby testified that Meek tried immediately after the wreck to get them to dispose of the shaving kit. The jury could decide that the reason for that zeal was something other than embarrassment regarding his toothbrush. There was substantial credible evidence that he was the knowing possessor of the contraband.

B. Transfer in Fact

¶17. Even if he had knowledge and control of the marihuana, Meek argues that he did not transfer it as alleged in the indictment. We repeat that the statute provides that a person may not "sell, barter, transfer, manufacture,

distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance . . . . " Miss. Code Ann. § 41.29-139(a)(1).

¶18. The testimony of the Good Samaritan Hemby and of the passenger Chauvin was that Meek tried immediately after the wreck to get them to dispose of the shaving kit containing concealed marihuana Meek gave the shaving kit to Hemby, whose suspicions led him to give it right back.

¶19.Whether this was a transfer should first be addressed by the definitions that are statutorily provided "Transfer" is not defined, but similar words are:

> (h) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship . . . .
>
> (l) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

Miss. Code Ann. § 41-29-105 (Supp. 1999).

¶20. Some words are interchangeable under this statute. The supreme court has held that "transfer" is the equivalent of "deliver" and vice versa. *Evans v. State,* 460 So.2d 824, 828 (Miss. 1984). The statutory definition of "deliver" is relatively broad, as even just an attempted transfer of the substance from one person to another is within the meaning of the word. Miss. Code Ann. § 41-29-105(h) (Supp. 1999). The supreme court has analyzed this broad language as being intended "to relieve the state of the task, oftentimes difficult if not impossible, of proving the

consideration paid for the contraband, its intentions being to thwart the exchange or transfer of the substance whether accompanied by consideration or not." *Wilkins v. State,* 273 So.2d 177 (Miss. 1973).

¶21. "Distribute" is the other word in the statute similar to "transfer." Distributing a controlled substance as defined in the statute "includes transactions which are sales as well as transactions which may not be considered sales." *Rogers v. State,* 599 So.2d 930, 934 (Miss. 1992). "Distribute" is the same thing as "deliver," and "deliver" can include an "attempted transfer" under section 41-29-105(*l*). Miss. Code § 41-29-139(a). "Deliver" therefore includes successful deliveries and failed ones. Though circular, we find that since "transfer" can mean "deliver," and "deliver" can mean "attempted transfer," the use of the word "transfer" in the statute and in the indictment is broad enough to include the attempt to transfer. The various words all seem to encompass attempts to commit the acts. To find that "deliver" includes an attempted transfer as the statute provides, but "transfer" does not include an attempted transfer, is to make an unreasonable distinction among synonyms.

¶22. Therefore, the exchange of consideration, the intent to place the contraband in commerce, and even the success of the transfer are irrelevant to a factual determination of transfer or delivery.

¶23. We acknowledge that the facts of a transfer to a stranger for the purpose of hiding evidence have not been in any Mississippi appellate decision under this statute. The trial court concluded that "to transfer means to pass from one hand to the other," finding that "based on the evidence that is before the Court, the controlled substance

passed from the hand of Mr. Meek to the hand of Reverend Hemby." The trial court was correct if the literal meaning of words in the statute control.

¶24. In the absence of a Mississippi Supreme Court interpretation, we look to whether other states have found similar acts to constitute the required "transfer" or "delivery." That kind of review is especially useful since this statute is taken from a uniform law adopted in roughly equivalent form by Congress and by a large number of states. Uniform Controlled Substances Act 1970, 9 U.L.A. 643 (1997); adopted 1971 Miss. Laws ch. 521; *see* Miss. Code Ann. § 41-29-101 (Rev. 1993).

¶25. Several courts have held that if the possessor of drugs shares them without compensation and for immediate use by an acquaintance, that is still within the meaning of "transfer." One court observed that the "offense does not require a finding of intent to sell, or to engage in commerce in marihuana. All that need be shown is a purpose of sharing the cache with at least one other person." *State v. Salyer,* 884 S.W.2d 354, 357 (Mo.App. 1994), citing *United States v. Coady,* 809 F.2d 119 (1st Cir. 1987). In another case the defendant admitted that he planned to share the drugs with a friend, which led the court to conclude that "giving or sharing drugs with another constitutes distribution under the law, and an intention to share is evidence of an intent to distribute." *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991).

¶26. One intermediate state court on quite similar facts held that the accused was guilty of delivery of a controlled substance. *State v. Gordon,* 536 S.W.2d 811, 817 (Mo. App. 1976). The evidence was that upon seeing police, Gordon walked up to several children and apparently with the

children's willing and knowing cooperation got them to place several bottles of illegal drugs into their coats. The court held that this voluntary surrendering of possession to third persons was sufficient to prove an illegal transfer. Gordon's argument was that the evidence "refutes any intention on his part to relinquish any right, title or interest he may have had in the controlled substances contained in the three bottles. Rather he reasons the evidence clearly moves that in passing the bottles and their contents to the two girls he did so with the intent to avoid being caught with them on his person." *Id.* at 815. Even if true, the court found the act to be a "delivery."

¶27. The *Gordon* opinion was later overruled because one of the linchpins for the result was the court's holding that an intent to relinquish control was not an element of the offense. *Id.* The Missouri Supreme Court disagreed. *State v. Green,* 629 S.W.2d 326, 329 (Mo. 1982), overruling *Gordon* and *State v. Meek,* 584 S.W.2d 168 (Mo. App. 1979).

¶28. What is different about what Meek did and *Gordon* is that there is some implication from *Gordon's* stated facts that the children would later give the drugs back to Gordon when the police left. Therefore he may not have had the intent permanently to relinquish control. Here there is no such suggestion in the evidence since Meek told Hemby to "get rid" of the kit. Thus even were we to agree with the *Green* conclusion that an intent must exist to transfer possession permanently, Meek would be guilty. To apply the Missouri *Gordon* case, as revised by the requirement of intent, had Meek given the bag containing drugs to two children in a schoolyard and told them to get rid of the bag, that would be a transfer.

¶29. Some potentially relevant additional case law should be examined. First, to prove a transfer there is no need to show an intent to sell, as is necessary under an indictment for possession with intent to sell. *E.g., Taylor v. State,* 656 So. 2d 104, 108 (Miss. 1995). The undeniable distinction here is that Meek was indicted for "transfer," a word that appears along with others in the statute that together "relieve the state of the task, oftentimes difficult if not impossible," of proving an intent to sell. *Wilkins,* 273 So.2d at 177.

¶30. Further, one Mississippi case discussed sharing contraband with others, but we do not read the decision as necessarily resolving the criminality, beyond possession alone, of that sharing.

> If a smoker gives an acquaintance a few cigarettes from his package, or a pack from his carton, does that mean he possessed the tobacco with an intent to distribute? Clearly he is guilty of actually distributing the tobacco he gives his friend, but does this mean he possessed the pack, or carton, with an intent to sell or distribute? That question, however, must wait another day for an answer, because – while almost – it is not quite presented here.

Stringfield v. State, 588 So. 2d 438, 439 (Miss. 1991). The second quoted sentence answers a hypothetical. We do not know if the court was concluding that the actual defendant Stringfield, by giving a controlled substance to a friend, was guilty of distribution but may not be guilty of possession with intent to distribute. Why the latter was not presented in the case is that Stringfield was indicted for having the intent to distribute the cocaine that he possessed at the time of his arrest. *Id.* The evidence that he

had *earlier* distributed cocaine to two people as a form of payment for help in converting powdered to rock cocaine, was not sufficient to show that he had an intent to distribute the relatively small quantity of cocaine that he still possessed when he was arrested. *Id.* as 441.

¶31. One way to read the *Stringfield* quote is that it was deferring any conclusion that the giving of a small quantity of drugs to a friend was "distribution" as meant under the statute, though it quite literally would fit most dictionary definitions of "distribution." Regardless of how far the *Stringfield* quote should be read, it would be *dicta* anyway. Whether we are deciding in the first instance or merely following *Stringfield,* we find that a transfer occurred.

¶32. The logic of this interpretation should not be ignored. What occurred here is equally amenable to the legislature's heightened scrutiny as would be a person's attempt to sell the single rock of crack cocaine that he had initially purchased only for personal use. Further, if he decided that instead of selling, he would give it away to a known user, that too is beyond mere possession. And finally, if as here a user decides to give the drugs to someone who may be unaware of what he is getting, but the accused is willing to risk that this person will be a user or become one because of the opportunity, it is within the language of this statute to consider that more than possession. Quite simply, the risk to society is magnified when a criminal moves from keeping drugs to himself and attempts to transfer drugs to others.

¶33. The trial court provided the jury this guidance on the question:

> the definition of "transfer" is to convey or remove something from one place, person, etc., to another, or to cause something to pass from one person to another; or to pass over the possession or control of something.

¶34. This interpretation is entirely consistent with the meaning of the statute. The prosecution proved that at least an attempted transfer occurred. Hemby testified that when he approached Meek's side of the automobile to check on his injuries, Meek was holding the shaving kit in his hands. He handed the kit to Hemby, saying "get rid of this" for him. The fact that Hemby held the kit for only a few seconds at most before returning it to Meek might prove that the transfer was not completed. Regardless of whether that is true, the statute also criminalizes in the same fashion an attempt to transfer. Miss. Code Ann. § 41-29-105(h) (Supp. 1999).

¶35. The legislature chose the words of the statute. It is for us to enforce them. There was at least an attempted transfer as defined in the statute.

C. Statutory Intent

¶36. Meek argues that the statute requires that the transfer be with the intent to sell the marihuana or to "place it in commerce." That argument arises from the statute's providing that no one shall "sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance . . . . " Miss. Code Ann. § 41-29-139(a)(1) (Supp. 1999). Meek would have us conclude that the phrase "intent to sell" applies to all the actions criminalized by the statute. The less forced reading of the

statute is that a conviction may be sustained if there is evidence that a person sold, manufactured or transferred. There may also be a conviction based on evidence that a person still possessing the contraband had the intention to sell, manufacture, or transfer. The accused must have some mental state of knowledge and intent depending on the nature of the act, but there is nothing in the statute that would suggest that every act done must be with the intent to sell. In fact, as already discussed one of the reasons for the words "delivery" and "transfer" is to avoid the need for proof that there was a profit motive.

¶37. The trial court was correct in its definition of "transfer" and in its decision not to grant a directed verdict to the defense on this basis.

III. *Weight of Evidence*

¶38. Finally, Meek assigns as error the trial court's refusal to grant his motion for a new trial since he believes the guilty verdict ignored the overwhelming weight of the evidence.

¶39. Meek refers to inconsistencies in the testimony of Hemby, Chauvin, and the investigating officer. While it is true that Chauvin gave a prior inconsistent statement resulting in the entry of a *nolle prosequi* in the first indictment, the reasons for that statement are detailed in her testimony at trial. What to make of those inconsistencies was an issue for the jury. Apparently Chauvin's explanation satisfied the jury that the change in her testimony was a result of her becoming aware of Meek's manipulation of her feelings for him.

¶40. The jury assays the credibility of witnesses and the weight to be given their testimony. *Collier v. State,* 711 So. 2d 458, 462 (Miss. 1998). Here, the jury found the testimony of the prosecution's witnesses credible and failed to believe Meek's denials of ownership, control and transfer of the marihuana. These are the conclusions of a reasonable jury and are not against the weight of the evidence presented at trial.

¶41. THE JUDGMENT OF THE CIRCUIT COURT OF LINCOLN COUNTY OF CONVICTION AS A HABITUAL OFFENDER OF UNLAWFUL TRANSFER OF MORE THAN ONE OUNCE OR MARIHUANA AND ENHANCED SENTENCE OF THIRTY YEARS, TO SERVE THE FIRST TEN YEARS, WITH THE LAST TWENTY YEARS TO BE SERVED ON POST-RELEASE SUPERVISION, AND THE PAYMENT OF COURT COSTS AND A $2,000 FINE, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., BRIDGES, IRVING, AND PAYNE, JJ., CONCUR.

DIAZ, J., CONCURRING IN PART AND DISSENTING IN PART, WITH SEPARATE WRITTEN OPINION, JOINED BY KING, P.J., LEE, MOORE AND THOMAS, JJ.

DIAZ, J., CONCURRING IN PART, DISSENTING IN PART:

¶42. I agree with the majority opinion to the extent that it holds that March Meek had possession of the marijuana that was recovered at the scene of the car wreck. However, I do not agree with the majority's interpretation of the

Mississippi Code Annotated Section 41-29-139 (Supp. 1999) which prohibits, *inter alia,* possession of a controlled substance with intent to transfer that substance.

¶43. In the case *sub judice,* Meek was pinned inside the passenger side of an automobile after surviving a head-on collision. In his shaving kit, he had concealed 140.9 grams of marijuana which was wrapped in two layers of cellophane. Phillip Hemby, the first person to approach the wreck, testified that Meek asked him "to get rid of his shaving kit." Meek disputes both possessing the marijuana and asking Hemby to hide it. As I have stated, I am not persuaded by Meek's argument that he did not possess the marijuana, but assuming *arguendo* that Meek did ask Hemby to dispose of his shaving kit, I do not agree with the majority's decision to affirm the conviction of possession with intent to transfer because it does not consider relevant Mississippi case law and it defies logic.

¶44. The majority relies on admittedly circular reasoning to define the word transfer as it appears in Meek's indictment and Section 41-29-139. Through the juxtaposition of several synonyms of "transfer", the majority asks us to take a mental leap and equate transfer and attempted transfer in the language of the statute and the indictment. The majority further concludes that the exchange of consideration, the intent to place the contraband in commerce, and the success of the transfer are irrelevant to Meek's situation. This analysis of the word transfer and the majority's implications of that definition simply are not applicable to the facts of this case since Meek was not transferring the drugs under the statute.

¶45. The majority contends that Meek's action of attempting to hand the concealed drugs to Hemby constituted

sharing the drugs which, under case law from other jurisdictions cited by the majority, brought Meek's action within the meaning of the word transfer. However, the majority fails to consider numerous cases in Mississippi that specifically address scenarios similar to the case at bar. In these cases, which include convictions for both marijuana and cocaine possession, facts did not exist to warrant convictions for intent to distribute the contraband.

¶46. "The evidence sufficient to infer intent to sell must be evaluated in each case." *Jackson v. State,* 580 So. 2d 1217, 1220 (Miss. 1991). The seminal case in Mississippi addressing the issues of sharing drugs and possessing drugs versus possessing a drug with intent to transfer is *Stringfield v. State,* 588 So. 2d 438 (Miss. 1991). In that case, Stringfield asked a friend to help him find someone to convert his powder cocaine into rock form. After finding someone to perform the task and the procedure was completed, Stringfield gave a portion of the rock cocaine to his friend and the third party. Stringfield was later arrested with nearly half an ounce of the rock cocaine on his person. *Id.* at 439. In *Stringfield,* the supreme court held that:

> [P]roof of possession with an intent to distribute or sell should not be based solely upon surmise or suspicion. There must be evidentiary facts which will rationally produce in the minds of jurors a certainty, a conviction beyond reasonable doubt that the defendant *did in actual fact intend to distribute or sell the cocaine [or marijuana], not that he might have such an intent.*

Id. at 440 (emphasis added). At trial, Stringfield admitted that he possessed enough rock cocaine for nearly four days

personal consumption. *Id.* at 440. The supreme court noted that this was not an unusual precaution for someone who was avoiding legal entanglements associated with supporting his habit when considered with the efforts by law enforcement officers to curtail the purchase and sale of cocaine. *Id.* Despite Stringfield's actions of sharing the rock cocaine with two other people, the supreme court did not find that his benevolence constituted intent to distribute *Id.* at 441.

> [C]riminal intent may, and ordinarily can only be shown by surrounding circumstances .... [A] jury may reasonably conclude that a defendant intended to unlawfully distribute a controlled substance, if the quantity or nature of the seized substance evidences an intent to distribute – as opposed to an intent merely to possess for personal use. Where the quantity or nature is such that it merely reflects possession for personal use [instead of] an intent to distribute [or transfer], then only a suspicion of intent is raised.

Taylor v. State, 656 So. 2d 104, 108 (Miss. 1995) (internal citations omitted). In *Taylor,* no direct evidence existed that Taylor had sold or intended to sell crack cocaine on the day he was arrested despite the fact that Taylor was associating with a known drug dealer under circumstances that the testifying officers considered typical drug activity viz. standing on a curb with a small quantity of crack in their hands and approaching cars that stop with their "wares." *Id.* at 106. The supreme court held that the evidence presented by the State was insufficient even though Taylor's conduct "was similar to that of others who traffic in drugs, and the cocaine was packaged in individual packets." *Id.*

¶47. Where intent to sell or transfer cannot be inferred from the circumstances, the quantity of the drugs recovered gives rise to presumption of intent to transfer. As noted by the supreme court, "Quantity, standing alone, might be insufficient to demonstrate an intent to distribute [or transfer] beyond a reasonable doubt." *Edwards v. State,* 615 So. 2d 590, 595 (Miss. 1993). However, in *Guilbeau v. State,* 502 So. 2d 639, 642 (Miss. 1987), the Mississippi Supreme Court held that the possession of 5,100 pounds of marijuana was sufficient to establish intent to distribute. The same conclusion was reached with regard to 348 pounds of marijuana in *Broches v. State,* 506 So. 2d 254, 260 (Miss. 1987). In *Jackson,* the defendant was accused of the possession with the intent to distribute marijuana packaged in six "nickel" bags. The court found the evidence insufficient to convict Jackson of possession with intent to distribute the marijuana even though he possessed six bags of marijuana and $103 in cash in his pocket.

¶48. Mississippi Code Annotated Section 41-29-139(a) (Supp. 1999) sets forth the penalty for any person knowingly or intentionally transferring or possessing with intent to transfer a controlled substance. Under subsection (b)(1), violators of subsection (a) who possess more than an ounce of marijuana may be imprisoned for not more than thirty years and fined at least $5000 and not more than $1,000,000.

¶49. Mississippi Code Annotated Section 41-29-139(c)(2)(C) states in part that any person knowingly or intentionally possessing more than thirty grams but less than 250 grams may be fined not more than $1,000, or confined in the county jail for not more than one year, or

both; or fined not more than $3,000, or imprisoned for not more than three years, or both.

¶50. "There is, of course, a very good reason for the difference in severity of sentence between a user and a peddler of cocaine [or marijuana], the latter posing a threat to society, the former a threat to himself." *Stringfield,* 588 So. 2d at 440. Here, Meek was not giving away "free samples of drugs" as the majority suggests, he was trying to conceal evidence, which is a different crime altogether. Even if Meek were attempting to share his marijuana with Hemby, he would not be guilty of possession with intent to transfer since the Mississippi Supreme Court, in cases similar to Meek's, has remanded for resentencing on the lesser-included-offense of possession where the poof was insufficient to support a charge of possession with intent to transfer. *Miller v. State,* 634 So. 2d 127 (Miss. 1994); *Jowers v. State,* 593 So. 2d 46 (Miss. 1992); *Thomas v. State,* 591 So. 2d 837 (Miss. 1991); *Jackson v. State,* 580 So. 2d 1217 (Miss. 1991).

¶51. The proof of intent to transfer is insufficient and cannot stand under the facts of this case. This case should be reversed on possession with intent to transfer, but affirmed and remanded for resentencing on possession alone.

KING, P.J., LEE, MOORE, AND THOMAS, JJ., JOIN THIS SEPARATE OPINION.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 97-CT-01557-SCT

MARCH MEEK

v.

STATE OF MISSISSIPPI

ON MOTION FOR REHEARING

DATE OF JUDGMENT:	11/12/1997
TRIAL JUDGE:	HON. KEITH STARRETT
COURT FROM WHICH APPEALED:	LINCOLN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOSEPH A. FERNALD, JR.
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	DUNN LAMPTON
NATURE OF THE CASE:	CRIMINAL – FELONY
DISPOSITION:	AFFIRMED – 10/18/2001
MOTION FOR REHEARING FILED:	05/04/2001; 11/16/2001; DENIED 1/24/2002
MANDATE ISSUED:	10/25/2001; RECALLED 11/20/2001; 2/14/2002

§ 41-29-139. Prohibited acts; penalties.

(a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:

(1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance; or

(2) To create, sell, barter, transfer, distribute, dispense or possess with intent to create, sell, barter, transfer, distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in subsections (f) and (g) of this section or in Section 41-29-142, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) In the case of controlled substances classified in Schedule I or II, as set out in Sections 41-29-113 and 41-29-115, except one (1) ounce or less of marihuana, and except a first offender as defined in Section 41-29-149(e) who violates subsection (a) of this section with respect to less than one (1) kilogram but more than one (1) ounce of marihuana, such person may, upon conviction, be imprisoned for not more than thirty (30) years and shall be fined not less than Five Thousand Dollars ($5,000.00) nor more than One Million Dollars ($1,000,000.00), or both;

(2) In the case of a first offender who violates subsection (a) of this section with an amount less than one (1) kilogram but more than one (1) ounce of marihuana as classified in Schedule I, as set out in Section 41-29-113, such person is guilty of a felony and upon conviction may be imprisoned for not more than twenty (20) years or fined not more than Thirty Thousand Dollars ($30,000.00), or both;

(3) In the case of one (1) ounce or less of marihuana, such person may, upon conviction, be imprisoned for not more than three (3) years or fined not more than Three Thousand Dollars ($3,000.00), or both;

(4) In the case of controlled substances classified in Schedules III and IV, as set out in Sections 41-29-117 and 41-29-119, such person may, upon conviction, be imprisoned for not more than twenty (20) years and shall be fined not less than One Thousand Dollars ($1,000.00) nor more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both; and

(5) In the case of controlled substances classified in Schedule V, as set out in Section 41-29-121, such person may, upon conviction, be imprisoned for not more than ten (10) years and shall be fined not less than One Thousand Dollars ($1,000.00) nor more than Fifty Thousand Dollars ($50,000.00), or both.

(c) It is unlawful for any person knowingly or intentionally to possess any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article. The penalties for any violation of this subsection (c) with respect to a controlled substance classified in Schedules I, II, III, IV or V, as set out in Sections 41-29-113, 41-29-115, 41-29-117, 41-29-119 or 41-29-121, including marihuana, shall be based on dosage unit as defined herein or the weight of the controlled substance as set forth herein as appropriate:

"Dosage unit (d.u.)" means a tablet or capsule, or in the case of a liquid solution, one (1) milliliter. In the case of lysergic acid diethylamide (LSD) the term, "dosage unit"

means a stamp, square, dot, microdot, tablet or capsule of a controlled substance.

For any controlled substance that does not fall within the definition of the term "dosage unit," the penalties shall be based upon the weight of the controlled substance.

The weight set forth refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

If a mixture or substance contains more than one (1) controlled substance, the weight of the mixture or substance is assigned to the controlled substance that results in the greater punishment.

Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedule I or II, except marihuana, in the following amounts shall be charged and sentenced as follows:

(A) Less than one-tenth (0.1) gram or one (1) dosage unit or less may be charged as a misdemeanor or felony. If charged by indictment as a felony; by imprisonment not less than one (1) nor more than four (4) years and a fine not more than Ten Thousand Dollars ($10,000.00). If charged as a misdemeanor; by imprisonment for up to one (1) year and a fine not more than One Thousand Dollars ($1,000.00).

(B) One-tenth (0.1) gram but less than two (2) grams or two (2) dosage units but less than ten (10) dosage units, by imprisonment for not less than two (2) years nor more than eight (8) years and a fine of not more than Fifty Thousand Dollars ($50,000.00).

(C) Two (2) grams but less than ten (10) grams or ten (10) dosage units but less than twenty (20) dosage units, by imprisonment for not less than four (4) years nor more than sixteen (16) years and a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00).

(D) Ten (10) grams but less than thirty (30) grams or twenty (20) dosage units but not more than forty (40) dosage units, by imprisonment for not less than six (6) years nor more than twenty-four (24) years and a fine of not more than Five Hundred Thousand Dollars ($500,000.00).

(E) Thirty (30) grams or more or forty (40) dosage units or more, by imprisonment for not less than ten (10) years nor more than thirty (30) years and a fine of not more than One Million Dollars ($1,000,000.00).

(2) Marihuana in the following amounts shall be charged and sentenced as follows:

(A) Thirty (30) grams or less by a fine of not less than One Hundred Dollars ($100.00) nor more than Two Hundred Fifty Dollars ($250.00). The provisions of this paragraph shall be enforceable by summons, provided the offender provides proof of identity satisfactory to the arresting officer and gives written promise to appear in court satisfactory to the arresting officer, as directed by the summons. A second conviction under this section within two (2) years shall be punished by a fine of Two Hundred Fifty Dollars ($250.00) and not less than five (5) days nor more than sixty (60) days in the county jail and mandatory participation in a drug education program, approved by the Division of Alcohol and Drug Abuse of the State Department of Mental

Health, unless the court enters a written finding that such drug education program is inappropriate. A third or subsequent conviction under this section within two (2) years is a misdemeanor punishable by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred Dollars ($500.00) and confinement for not less than five (5) days nor more than six (6) months in the county jail. Upon a first or second conviction under this section the courts shall forward a report of such conviction to the Mississippi Bureau of Narcotics which shall make and maintain a private, nonpublic record for a period not to exceed two (2) years from the date of conviction. The private, nonpublic record shall be solely for the use of the courts in determining the penalties which attach upon conviction under this section and shall not constitute a criminal record for the purpose of private or administrative inquiry and the record of each conviction shall be expunged at the end of the period of two (2) years following the date of such conviction;

(B) Additionally, a person who is the operator of a motor vehicle, who possesses on his person or knowingly keeps or allows to be kept in a motor vehicle within the area of the vehicle normally occupied by the driver or passengers, more than one (1) gram, but not more than thirty (30) grams, of marihuana is guilty of a misdemeanor and upon conviction may be fined not more than One Thousand Dollars ($1,000.00) and confined for not more than ninety (90) days in the county jail. For the purposes of this subsection, such area of the vehicle shall not include the trunk of the motor vehicle or the areas not normally occupied by the driver or passengers if the vehicle is not equipped with a trunk. A utility or glove

compartment shall be deemed to be within the area occupied by the driver and passengers;

(C) More than thirty (30) grams but less than two hundred fifty (250) grams may be fined not more than One Thousand Dollars ($1,000.00), or confined in the county jail for not more than one (1) year, or both; or fined not more than Three Thousand Dollars ($3,000.00), or imprisoned in the State Penitentiary for not more than three (3) years, or both;

(D) Two hundred fifty (250) grams but less than five hundred (500) grams, by imprisonment for not less than two (2) years nor more than eight (8) years and by a fine of not more than Fifty Thousand Dollars ($50,000.00);

(E) Five hundred (500) grams but less than one (1) kilogram, by imprisonment for not less than four (4) years nor more than sixteen (16) years and a fine of less than Two Hundred Fifty Thousand Dollars ($250,000.00);

(F) One (1) kilogram but less than five (5) kilograms, by imprisonment for not less than six (6) years nor more than twenty-four (24) years and a fine of not more than Five Hundred Thousand Dollars ($500,000.00);

(G) Five (5) kilograms or more, by imprisonment for not less than ten (10) years nor more than thirty (30) years and a fine of not more than One Million Dollars ($1,000,000.00).

(3) A controlled substance classified in Schedule III, IV or V as set out in Sections 41-29-117 through 41-29-121, upon conviction, may be punished as follows:

(A) Less than fifty (50) grams or less than one hundred (100) dosage units is a misdemeanor and punishable by not more than one (1) year and a fine of not more than One Thousand Dollars ($1,000.00).

(B) Fifty (50) grams but less than one hundred fifty (150) grams or one hundred (100) dosage units but less than five hundred (500) dosage units, by imprisonment for not less than one (1) year nor more than four (4) years and a fine of not more than Ten Thousand Dollars ($10,000.00).

(C) One hundred fifty (150) grams but less than three hundred (300) grams or five hundred (500) dosage units but less than one thousand (1,000) dosage units, by imprisonment for not less than two (2) years nor more than eight (8) years and a fine of not more than Fifty Thousand Dollars ($50,000.00).

(D) Three hundred (300) grams but less than five hundred (500) grams or one thousand (1,000) dosage units but less than two thousand five hundred (2,500) dosage units, by imprisonment for not less than four (4) years nor more than sixteen (16) years and a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00).

(E) Five hundred (500) grams or more or two thousand five hundred (2,500) dosage units or more, by imprisonment for not less than six (6) years nor more than twenty-four (24) years and a fine of not more than Five Hundred Thousand Dollars ($500,000.00).

(d)(1) It is unlawful for a person who is not authorized by the State Board of Medical Licensure,

State Board of Pharmacy, or other lawful authority to use, or to possess with intent to use, paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Law. Any person who violates this subsection is guilty of a misdemeanor and upon conviction may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both; however, no person shall be charged with a violation of this subsection when such person is also charged with the possession of one (1) ounce or less of marihuana under subsection (c)(2)(A) of this section.

(2) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Law. Any person who violates this subsection is guilty of a misdemeanor and upon conviction may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(3) Any person eighteen (18) years of age or over who violates subsection (d)(2) of this section by delivering or selling paraphernalia to a person under eighteen (18) years of age who is at least three (3) years his junior is guilty of a misdemeanor and upon conviction may be confined in the county jail for not

more than one (1) year, or fined not more than One Thousand Dollars ($1,000.00), or both.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as paraphernalia. Any person who violates this subsection is guilty of a misdemeanor and upon conviction may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(e) It shall be unlawful for any physician practicing medicine in this state to prescribe, dispense or administer any amphetamine or amphetamine-like anorectics and/or central nervous system stimulants classified in Schedule II, pursuant to Section 41-29-115, for the exclusive treatment of obesity, weight control or weight loss. Any person who violates this subsection, upon conviction, is guilty of a misdemeanor and may be confined for a period not to exceed six (6) months, or fined not more than One Thousand Dollars ($1,000.00), or both.

(f) Except as otherwise authorized in this article, any person twenty-one (21) years of age or older who knowingly sells, barters, transfers, manufactures, distributes or dispenses during any twelve (12) consecutive month period: (i) ten (10) pounds or more of marihuana; (ii) two (2) ounces or more of heroin; (iii) two (2) or more ounces of cocaine or of any mixture containing cocaine as described in Section 41-29-105(s), Mississippi Code of 1972; or (iv) one hundred (100) or more dosage units of morphine, Demerol or Dilaudid, shall be guilty of a felony and, upon conviction thereof, shall be sentenced to life imprisonment

and such sentence shall not be reduced or suspended nor shall such person be eligible for probation or parole, the provisions of Sections 41-29-149, 47-5-139, 47-~~7-3~~ and 47-7-33, Mississippi Code of 1972, to the contrary notwithstanding. The provisions of this subsection shall not apply to any person who furnishes information and assistance to the bureau or its designee which, in the opinion of the trial judge objectively should or would have aided in the arrest or prosecution of others who violate this subsection. The accused shall have adequate opportunity to develop and make a record of all information and assistance so furnished.

(g)(1) Any person trafficking in controlled substances shall be guilty of a felony and upon conviction shall be imprisoned for a term of thirty (30) years and such sentence shall not be reduced or suspended nor shall such person be eligible for probation or parole, the provisions of Sections 41-29-149, 47-5-139, 47-7-3 and 47-7-33, Mississippi Code of 1972, to the contrary notwithstanding and shall be fined not less than Five Thousand Dollars ($5,000.00) nor more than One Million Dollars ($1,000,000.00).

(2) "Trafficking in controlled substances" as used herein means to engage in three (3) or more component offenses within any twelve (12) consecutive month period where at least two (2) of the component offenses occurred in different counties. A component offense is any act which would constitute a violation of subsection (a) of this section. Prior convictions shall not be used as component offenses to establish the charge of trafficking in controlled substances.

(3) The charge of trafficking in controlled substances shall be set forth in one (1) count of an indictment with each of the component offenses alleged

therein and it may be charged and tried in any county where a component offense occurred. An indictment for trafficking in controlled substances may also be returned by the State Grand Jury of Mississippi provided at least two (2) of the component offenses occurred in different circuit court districts.